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Yes, Virginia, There Is a United States Constitution: Selected Criminal Law and Criminal Procedure Cases from the Supreme Court's 1998-99 Term

Chris Blair
christen-blair@utulsa.edu

YES, VIRGINIA, THERE IS A UNITED STATES CONSTITUTION: SELECTED CRIMINAL LAW AND CRIMINAL PROCEDURE CASES FROM THE SUPREME COURT'S 1998-99 TERM

Chris Blair*

INTRODUCTION

The discussion of the following four cases represents only a small portion of the criminal law and criminal procedure cases decided by the United States Supreme Court during its 1998-99 term.[1] The cases were chosen partly because of the consideration of time, but mostly because of their general interest and importance. Although the cases were not chosen with any other theme in mind, it turns out that the common thread among the four cases is the consistency with which the Court reaffirmed and applied relatively longstanding constitutional principles. In *Lilly v. Virginia*[2] the Court reaffirmed the test it originally developed in *Ohio v. Roberts*[3] for reconciling the hearsay exception with the Confrontation Clause. In *City of Chicago v. Morales*[4] the Court applied its void for vagueness test to invalidate a city ordinance aimed at controlling gang violence by allowing police to disperse people who were loitering. In *Mitchell v. United States*[5] the principle

*. Associate Professor, University of Tulsa College of Law.

1. In other cases not reviewed here, the Court decided that the jury must agree unanimously on which substantive offenses constitute the continuing series of offenses to make out a violation of the "continuing criminal enterprise" statute, Richardson v. United States, 526 U.S. 813 (1999); that the giving of a thing of value to a public official does not violate the "illegal gratuities" statute unless a link between the gift and a specific act by the official is proven, United States v. Sun-Diamond Growers of California, 526 U.S. 398 (1999); that serious bodily injury to, or death of, a victim is an element of the offense of carjacking, rather than just a sentencing factor, Jones v. United States, 526 U.S. 227 (1999); that the intent to cause death or harm under the federal carjacking statute is satisfied by "conditional" intent, Holloway v. United States, 526 U.S. 1 (1999); that under the 1994 Death Penalty Act the Eighth Amendment does not require that the jury in a capital case be told what will happen if the jury cannot agree on the proper punishment and that in such a situation the Act calls for the imposition of a noncapital sentence by the trial judge, Jones v. United States, 527 U.S. 373 (1999); decided an issue relative to attorneys' fees under the Prison Litigation Reform Act, Martin v. Hadix, 527 U.S. 343 (1999); and that it is a violation of the Fourth Amendment for law enforcement officers to allow representatives of the media to enter private residences during the execution of arrest or search warrants, Wilson v. Layne, 526 U.S. 603 (1999); Hanlon v. Berger, 526 U.S. 808 (1999).

2. 527 U.S. 116 (1999).

3. 448 U.S. 56 (1980).

4. 527 U.S. 41 (1999).

5. 526 U.S. 314 (1999).

first announced in *Griffin v. California*[6], that no adverse inference could be drawn form a defendant's silence, was applied to the sentencing phase. And in *Strickler v. Greene*[7] the Court reaffirmed the test for prejudice when the state fails to disclose exculpatory material to a defendant. Even though all of these cases were consistent in reaffirming longstanding principles, they were also consistent in exposing varying levels of dissatisfaction with those principles.

LILLY V. VIRGINIA[8] - HEARSAY AND THE CONFRONTATION CLAUSE

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him..."[9] The hearsay rule[10] excludes out of court statements offered for their truth primarily because the declarant of the statement has not been subject to cross-examination concerning the statement.[11] Thus, both the Confrontation Clause and the hearsay rule grew out of a concern over the reliability of evidence provided by someone who has not been "confronted" or cross-examined.[12] The hearsay rule, though, provides numerous exceptions that allow uncross-examined (and "unconfronted") statements to be admissible.[13] Thus, an issue that the Supreme Court has struggled with over the years is whether statements that qualify for admission under the hearsay rule must, nonetheless, be excluded from a criminal trial because the declarant of those statements has not been confronted by the defendant.

The Supreme Court has recognized that if the language of the Confrontation Clause were read literally "it would require, on objection, the exclusion of any statement made by a declarant not present at trial."[14] That result, which would "abrogate virtually every hearsay exception," has been rejected as "unintended and too extreme."[15] On the other hand, the "historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay."[16] Thus, in *Ohio*

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6. 380 U.S. 609 (1965).
7. 527 U.S. 263 (1999).
8. 527 U.S. 116 (1999).
9. U.S. CONST. amend. VI.
10. The hearsay rule, as codified in the Federal Rules of Evidence, defines hearsay as a "statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).
11. *See e.g.*, CHARLES MCCORMICK, MCCORMICK ON EVIDENCE, § 245 (4th ed. 1992); Pointer v. Texas, 380 U.S. 400, 404 (1965); California v. Green, 399 U.S. 149, 158 (1970).
12. The Supreme Court has recognized that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). *See also* California v. Green, 399 U.S. 149, 157 (1970) ("it is this literal right to 'confront' the witness at the time of the trial that forms the core of the values furthered by Confrontation Clause").
13. FED. R. EVID. 803 has 23 exceptions, FED. R. EVID. 804 has 5, FED. R. EVID. 801(d) treats 3 different statements by witnesses and 5 types of admissions by a party opponent as the functional equivalent of exceptions, and FED. R. EVID. 807 provides for a residual exception for particularly trustworthy statements that do not fit any other exceptions.
14. Ohio v. Roberts, 448 U.S. 56, 63 (1980)
15. *Id.*
16. *Id.*

v. Roberts the Supreme Court began to lay down "a general approach to the problem" of "reconciling hearsay exceptions with the Confrontation Clause."[17]

In *Roberts* the Court held that the Confrontation Clause restricted the admission of hearsay in two separate ways. "First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases where prior cross-examination has occurred),[18] the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[19] Once the witness is shown to be unavailable, only hearsay that bears certain "indicia of reliability" can be admitted. This theory is based on the premise that the underlying purpose of confrontation is to ensure reliability.[20] The Court then went on to hold that "[r]eliability can be inferred without more in a case where the evidence falls within a *'firmly rooted'* hearsay exception."[21] In other cases, the evidence must be excluded, at least absent a showing of *"particularized guarantees of trustworthiness."*[22]

The Court soon retreated from the unavailability requirement, however. In *United States v. Inadi*[23] the Court rejected the defendant's contention that in order to admit a statement under the co-conspirator exception to the hearsay rule, the government first had to make a showing of unavailability. Likewise, in *White v. Illinois*[24] the Court held that unavailability was not a prerequisite to the admission of statements under the spontaneous declaration and medical examination exceptions to the hearsay rule. Unlike the former testimony exception used in *Roberts*, the Federal Rules of Evidence do not require that the declarant of a co-conspirator, spontaneous declaration, or medical examination statement be unavailable. Thus, if Inadi's and White's positions had prevailed, the Confrontation Clause would have imposed an unavailability requirement on the admission of hearsay exceptions that the Rules of Evidence themselves do not impose.[25] In *White*, the Court held that "Roberts stands for the proposition that unavailability analysis is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial

17. Bourjaily v. United States, 483 U.S. 171, 182 (1987).

18. In Roberts, the prosecution utilized the former testimony exception to the hearsay rule to introduce testimony given in a preliminary hearing that had already been subject to cross-examination.

19. *Roberts*, 448 U.S. at 65.

20. *Id.*

21. Lilly, 527 U.S. at 126 (1999) (emphasis added). The plurality opinion stated that "[w]e now describe a hearsay exception as 'firmly rooted' if, in light of 'longstanding judicial and legislative experience.' *Idaho v. Wright*, 497 U.S. 805, 817 (1990), 'rest[s] [on] such [a] solid foundatio[n] that admission of virtually any evidence within [it] comports with the 'substance of constitutional protection.' Roberts, 448 U.S. at 66 (quoting Mattox v. United States, 156 U.S. 237, 244 (1895))." The Court in Lilly further stated that "[e]stablished practice, in short, must confirm that statements falling within a category of hearsay inherently 'carr[y] special guarantees of credibility' essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony." *Id.* (citing White v. Illinois, 502 U.S. 346, 356 (1992)).

22. White, 502 U.S. at 356.

23. 475 U.S. 387 (1986).

24. 502 U.S. 346 (1992).

25. Under the Federal Rules of Evidence, only the Rule 804 exceptions require a showing of unavailability. The co-conspirator exception is in Rule 801(d)(2)(E).

proceeding."[26]

The Court has, however, consistently applied the "indicia of reliability" prong of the *Roberts* test. In *Bourjaily v. United States*[27] the Court held that the co-conspirator exception to the hearsay rule was so "firmly rooted" that, consistent with *Roberts,* no independent inquiry into its indicia of reliability was required. In *White v. Illinois*[28] the court reached a similar result with respect to the spontaneous declaration and medical examination exceptions to the hearsay rule. Furthermore, in *Idaho v. Wright*[29] the Court held that a statement admitted pursuant to the residual exception to the hearsay rule was not "firmly rooted' and then proceeded to analyze whether the admitted statement had "particularized guarantees of trustworthiness."[30]

In *Lilly v. Virginia*[31] the Court was once again faced with the task of determining whether an out-of-court statement admitted pursuant to a hearsay exception violated the Confrontation Clause. Lilly, his brother Mark, and Gary Bender were arrested after a two day crime spree during which they had stolen some guns and liquor and kidnaped and killed Alex DeFilippis. Mark told the police that he had stolen the liquor, but that Barker had stolen the guns and that Lilly had shot DeFilippis. Mark was called as a witness at Lilly's trial, but he invoked his privilege against self-incrimination. The trial court then admitted his statements to the police under the declaration against interest exception to the hearsay rule. The Supreme Court unanimously agreed to reverse Lilly's conviction.

In a plurality opinion, concurred in by Souter, Ginsburg and Breyer, Justice Stevens applied the Roberts test discussed above and concluded that a declaration against penal interest that inculpates a third party is not a "firmly rooted" hearsay exception.[32] Applying the second prong of the *Roberts* test, the same plurality then concluded that Mark's statements also did not bear "particularized guarantees of trustworthiness."[33] As a result, the admission of Mark's statements violated Lilly's Confrontation Clause rights and the case was remanded to determine if such error was harmless under *Chapman v. California.*[34]

The significance of *Lilly v. Virginia* lies partly in what it says about continuing vitality of the *Roberts* test as the method of analysis for reconciling the hearsay rule and the Confrontation Clause. The fact that only four justices concurred in the opinion applying the *Roberts* analysis might at first suggest that a majority of the Court is ready to abandon that approach in favor of some other Confrontation Clause analysis. Actually, though, Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy in a concurring opinion, only disagreed with the application of the *Roberts* test, not the test itself, and thought that the case should be remanded

26. *White,* 502 U.S. at 741.
27. 483 U.S. 171 (1987).
28. 502 U.S. 346 (1992).
29. 497 U.S. 805 (1990).
30. *Id.* at 819.
31. 527 U.S. 116 (1999).
32. Lilly, 527 U.S. at 134.
33. *Id.* at 138.
34. 386 U.S. 18 (1967).

to allow Virginia to demonstrate that Mark's confession bore the "particularized guarantees of trustworthiness" under *Roberts*.[35] However, both Justices Scalia and Thomas, while concurring in the judgment, utilized a different Confrontation Clause analysis. They both ascribed to the view that "'[t]he federal constitutional right of confrontation extends to any witness who actually testifies at trial' and 'extrajudicial statements only insofar as they are contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions.'"[36] Justice Breyer, however, who concurred with Stevens' analysis under *Roberts*, actually wrote a separate concurrence in which he criticized the *Roberts* approach.[37] However, because he thought that the admission of the confession in this case violated the Confrontation Clause under any test, he was willing to "leave the question open for another day."[38] Thus, although a majority of the Court was willing to apply the *Roberts* analysis to the situation in *Lilly*, there are clearly at least three justices who are ready to reexamine it in the appropriate case.

The greater significance of *Lilly*, however, lies in what it has done to the ability of the prosecution to use an accomplice's confession against a criminal defendant. The use of a third party declaration against interest to inculpate a criminal defendant is actually of fairly recent origin.[39] Although declarations against pecuniary and proprietary interests have long been recognized, courts were reluctant to recognize a declaration against penal interest for fear that defendants might concoct false confessions to exculpate themselves.[40] Prior to the adoption of the Federal Rules of Evidence, very little attention was paid to the possibility of using such declarations to inculpate the accused. After the recognition of declarations against penal interest in Rule 804(b)(3) of the Federal Rules of Evidence, however, the admission of such statements against a defendant has become much more common.[41]

In the 1994 case of *Williamson v. United States,*[42] the Court had the first occasion to clarify the scope of the hearsay exception for declarations against penal interest under Rule 804(b)(3) of the Federal Rules of Evidence.[43] In *Williamson,* as in *Lilly*, the trial court admitted a statement by a Reginald Harris, in which Harris implicated both himself and Williamson in a drug transaction. The Supreme Court did not address Williamson's Confrontation Clause claim because it decided the case on the basis of its interpretation of Rule 804(b)(3) of the Federal Rules of

35. Lilly, 527 U.S. at 142 (Breyer, J., concurring).
36. *Id.* at 142 (citing Justice Thomas' concurring opinion in White v. Illinois, 502 U.S. 346, 365 (1992)).
37. *Id.* at 138.
38. *Id.* at 142.
39. MCCORMICK, *supra* note 11, at § 318.
40. *Id.* Even though the Federal Rules of Evidence recognized the declaration against penal interest, the drafters of the Rules were still concerned enough about the prospect of false confessions to require that any such statements used to exculpate the accused are not admissible "unless corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3).
41. *Id.*
42. 512 U.S. 594 (1994).
43. FED. R. EVID. 804(b)(3) provides a hearsay exception for "[a] statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true," provided that the declarant is unavailable under FED. R. EVID. 804(a).

Evidence. As a matter of statutory construction, the Court determined that 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."[44] The Court further stated that the "district court may not just assume . . . that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else."[45]

If Lilly had been tried in federal court, it is quite clear that under *Williamson,* Mark's statement implicating Lilly would not have qualified as a declaration against penal interest under Rule 804(b)(3). Virginia, of course, is not bound by the *Williamson* precedent in the interpretation of its own rules of evidence. As a result the Virginia Supreme Court concluded that Mark's statements, which even the court characterized as "self-serving," were declarations of an unavailable witness against penal interest and thus fell within an exception to the Virginia hearsay rule.[46] The Virginia Supreme Court then applied the *Roberts* test to Lilly's Confrontation Clause claim and concluded that "admissibility into evidence of the statement against penal interest of an unavailable witness is a 'firmly rooted' exception to the hearsay rule in Virginia."[47]

The plurality opinion in *Lilly* began its analysis of the Confrontation Clause claim by pointing out that although "[w]e . . . must [assume] that Mark's statements were against his penal interest as a matter of state law, . . . the question whether the statement falls within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law."[48] The opinion then took a long look at the history of the use of confessions by an accomplice which incriminates a criminal defendant and concluded that far from being "firmly rooted," they are actually of "quite recent vintage."[49] The opinion further stated that it "is clear that our cases consistently have viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of those 'hearsay exception[s] [that are] so trustworthy that adversarial testing can be expected to add little to [the statements'] reliability.'"[50]

Having determined that the admission of Mark's statements did not fall under a "firmly rooted" hearsay exception, the plurality opinion then turned to an analysis of the second prong of the *Roberts* test; whether the statement bore any "particularized guarantees of trustworthiness."[51] Virginia argued that the statements were reliable because 1) he "was cognizant of the import of his statements and that he was implicating himself as a participant in numerous crimes,"[52] 2) "[e]lements of [his] statements were independently corroborated" by other evidence offered at

44. Williamson, 512 U.S. at 600.
45. *Id.* at 601.
46. Lilly v. Commonwealth, 499 S.E.2d 522 (1998).
47. *Id.* at 534.
48. Lilly, 527 U.S. at 124.
49. *Id.* at 130.
50. *Id.* at 132 (citing White v. Illinois, 502 U.S. 346 (1992) for the test for determining "firmly rooted" hearsay exceptions.) *See also supra* note 21.
51. Ohio v. Roberts, 448 U.S. 56 (1980).
52. Lilly, 527 U.S. at 134 (citing Lilly v. Commonwealth, 499 S.E.2d 522, 534 (1998)).

trial,[53] 3) the police read Mark his Miranda rights,[54] and 4) the police did not promise him leniency in return for his testimony.[55] The plurality readily dismissed these arguments by pointing out that: 1) the Court had already held "[t]hat a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts;"[56] 2) the Court had already rejected the notion that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears 'particularized guarantees of trustworthiness;'"[57] 3) the Court had rejected a similar argument by noting that a finding that a confession was "voluntary for Fifth Amendment purposes . . . does not bear on the question of whether the confession was also free from any desire, motive, or impulse [the declarant] may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate [the defendant's] involvement;"[58] and 4) that the "police need not tell a person who is in custody that his statements may gain him leniency in order for the suspect to surmise that speaking up, and particularly placing blame on his cohorts, may inure to his advantage."[59] The opinion concluded by stating that it "is abundantly clear" that there was no "basis for concluding that [Mark's] comments regarding [Lilly's] guilt were so reliable that there was no need to subject them to adversarial testing in a trial setting."[60]

On a more basic level, the decision in *Lilly v. Virginia* serves as a reminder of why we have and need a Supreme Court to protect against the cavalier treatment of constitutional rights by state courts. The Virginia state courts, including the Virginia Supreme Court, showed no interest whatsoever in respecting Lilly's Sixth Amendment right "to be confronted with the witnesses against him."[61] The opinion of the Virginia Supreme court provided almost no real analysis of the Confrontation Clause issue and reads as though that court felt that it could get away with anything and would not be subject to scrutiny by the United States Supreme Court. Fortunately, the United States Supreme Court firmly told them that, yes, Virginia, there is a United States Constitution and even you have to comply with it.

Although the Virginia Supreme Court did purport to apply the *Roberts* two prong test, it did so in a perfunctory manner that defied the Constitution and Supreme Court precedent. In *Williamson v. United States,*[62] although only a statutory interpretation case, the Supreme Court had clearly indicated that it would not likely consider declarations against interest that inculpated a third party to fall within a "firmly rooted" hearsay exception. Although specifically declining to

53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 138 (citing Williamson, 512 U.S. at 599).
57. *Id.* at 137, (citing Idaho v. Wright, 497 U.S. 805 (1990)).
58. *Lilly,* 527 U.S. at 138 (citing Lee v. Illinois, 476 U.S. 530, 544 (1986)).
59. *Id.*
60. *Id.* Although the other justices did not join this conclusion about the lack of "particularized guarantees of trustworthiness," they did not dispute it either. Justices Scalia and Thomas did not apply the Roberts test, while Chief Justice Rehnquist and Justices O'Connor and Kennedy would have remanded the case to allow the Virginia Supreme Court to make the initial inquiry.
61. U.S. CONST. amend. VI.
62. 512 U.S. 594 (1994).

address the Confrontation Clause issue, the Court in *Williamson* did point out that the fact that a statement that is "genuinely self-inculpatory" is "itself one of the 'particularized guarantees of trustworthiness' that makes a statement admissible under the Confrontation Clause."[63] Not only did the Virginia Supreme Court itself refer to the statements at issue as "self-serving," which could hardly make them "genuinely self-inculpatory," the court never even bothered to discuss the *Williamson* case for what light it might shed on whether a declaration against interest that inculpates a third party could qualify as a "firmly rooted" hearsay exception. And even more blatantly, the Virginia Supreme Court held that such a statement was "firmly rooted" despite the fact that "even Virginia rarely allowed statements against the penal interest to be used at criminal trials" and had only "relaxed that portion of its hearsay law" in 1995.[64] Apparently the Virginia Supreme court felt that "longstanding judicial and legislative experience"[65] could be had in three years.

The shallowness of the Virginia Supreme Court's treatment of the Confrontation Clause issue is further highlighted by the fact that not one justice of the United States Supreme Court accepted Virginia's analysis. Although the justices were kind in their disagreement with the Virginia Supreme Court, they were also quite firm that there was no legitimate basis for that court's decision. In disagreeing with the Virginia Supreme Court's "firmly rooted" hearsay exception analysis, the plurality opinion said that it was "clear" that the Supreme Court cases had "consistently" viewed "accomplice's statements that shift or spread the blame to a criminal defendant"as falling outside a firmly rooted hearsay exception.[66] The plurality further stated that it is "abundantly clear" that neither the statements at issue nor the circumstances under which they were made provided sufficient indicia of reliability.[67] Justice Breyer, although critical of the *Roberts* approach to the Confrontation Clause/hearsay problem, effectively stated that the statements at issue were such an obvious violation of the Confrontation Clause that it didn't matter what test they used.[68] Justice Scalia, in a similar vein, referred to the introduction of the statements at issue as a "paradigmatic Confrontation Clause violation."[69] Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, was probably the most blunt when he wrote that the statements at issue "are not in the least against Mark's penal interest."[70] And at another point he wrote that "the relevant portions of Mark Lilly's confession were simply not 'declarations against penal interest' as that term is understood in the law of evidence."[71] Thus, the Virginia Supreme Court, which had unanimously held that there had been no

63. *Id.*
64. Lilly, 527 U.S. at 134.
65. *Id.* at 125.
66. *Id.* at 133.
67. *Id.* at 138.
68. *Id.* at 142.
69. *Id.*
70. *Lilly*, 527 U.S. at 1904 (Rehnquist, J., concurring).
71. *Id.*

Confrontation Clause violation, was unanimously told that they were wrong.

CITY OF CHICAGO V. MORALES[72] - VOID FOR VAGUENESS

Prior to the 1992 adoption of the Gang Congregation Ordinance at issue in *City of Chicago v. Morales,*[73] the city council's Committee on Police and Fire held hearings to explore the problem of Chicago's street gangs, and in particular, the consequences of public loitering by gang members.[74] Based on evidence generated through those hearings, the Chicago City Council made a number of findings that are included in the text of the Gang Congregation Ordinance and explain the reasons for its enactment.[75] The council found that the city's increasing rate of murder as well as violent and drug related crime was due largely to the continuing increase in criminal street gang activity. The council also stated that gang members "establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . [m]embers of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present . . ."[76] The council further found that "loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area" and that "[a]ggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear."[77] The council concluded that the city "has an interest in discouraging all persons from loitering in public places with criminal gang members."[78]

As a result of these findings, the Chicago City Council enacted the Gang Congregation Ordinance which creates a criminal offense punishable by a fine up to $500, imprisonment up to six months, and the performance of up to 120 hours of community service. Four things must happen before an offense is committed. First, a police officer must reasonably believe that at least one of the two or more persons present in a "public place" is a "criminal street gang member."[79] Second, the persons must be "loitering," which the ordinance defines as "remain[ing] in any one place with no apparent purpose."[80] Third, the police officer must then order all of the persons to "disperse and remove themselves from the area."[81] Fourth, any person, whether a gang member or not, who violates such a dispersal order, is guilty

72. 527 U.S. 41 (1999).
73. *Id.*
74. Morales, 527 U.S. at 43.
75. *Id. See also* City of Chicago v. Morales, 687 N.E.2d 53, 58 (Ill. 1997).
76. Morales, 527 U.S. at 44.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*

of violating the ordinance.[82]

During the approximately three years when the ordinance was enforced, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance.[83] As a result of the subsequent enforcement proceedings, eleven trial judges ruled the ordinance invalid while two judges upheld its constitutionality.[84] The Illinois Appellate Court consolidated several of those cases and declared the ordinance unconstitutional.[85] The Illinois Supreme Court affirmed.[86] The United States Supreme Court affirmed the decision of the Illinois Supreme Court, holding that the Chicago Gang Congregation Ordinance was unconstitutionally vague.[87]

In an opinion written by Justice Stevens, and concurred in by Justices Breyer, Ginsburg, Kennedy, O'Connor, and Souter, the Court held that the "broad sweep of the ordinance . . . violates 'the requirement that a legislature establish minimal guidelines to govern law enforcement.'"[88] The decision focused on the definition of loitering as "to remain in any one place with no apparent purpose," which in the words of the Illinois Supreme Court, "provides absolute discretion to police officers to determine what activities constitute loitering."[89] The Court then stated that it had "no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court."[90] "[P]utting to one side our duty to defer to a state court's construction of the scope of a local enactment,"[91] the court then proceeded to consider, and reject, three ways in which the City of Chicago had suggested the text of the ordinance limited the officer's discretion.

First, the city argued that an officer could not issue a dispersal order to anyone

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82. The ordinance (Chicago Municipal Code § 8-4-015) provides in pertinent part:
(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
(c) As used in this section:
(1) 'Loiter' means to remain in any one place with no apparent purpose.
(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one or more of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
....
(5) 'Public place' means the public way and any location open to the public, whether publicly or privately owned.

83. Morales, 527 U.S. at 48.

84. *Id.*

85. *Id.*; Chicago v. Youkhana, 660 N.E.2d 34 (Ill. App. Ct. 1995); Chicago v. Ramsey, 697 N.E.2d 11 (Ill. App. Ct.1995); Chicago v. Morales, 697 N.E.2d 11 (Ill. App. Ct. 1995).

86. City of Chicago v. Morales, 687 N.E.2d. 53 (Ill. 1997).

87. Morales, 527 U.S. at ___, 119 S. Ct. at 1856.

88. *Id.* at 1861 (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

89. Morales, 687 N.E.2d at 63.

90. Morales, 527 U.S. at 59.

91. *Id.*

who is moving or who has an apparent purpose.[92] The Court responded by pointing out that the fact that the ordinance dose not apply to people who are moving "does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance."[93] "The 'no apparent purpose' standard for making that decision is inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene."[94] Second, the city argued that the ordinance does not allow an arrest if individuals obey a dispersal order. Again the Court pointed out that this fact "does not provide any guidance to the officer deciding whether such an order should issue."[95] Third, the city suggested that an officer's discretion was sufficiently controlled because no order could issue unless the officer reasonably believed that one of the loiterers was a member of a criminal street gang. The Court again disagreed and held that the ordinance still applies to "everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them."[96]

In a plurality opinion Justice Stevens, joined by Justices Ginsburg and Souter, also concluded that the ordinance violates Due Process because it fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.[97] Although Justices O'Connor, Breyer and Kennedy did not join that part of Stevens opinion, they did not necessarily disagree with it. In fact, Justice Kennedy wrote in a concurrence, that he "also share[d] many of the concerns . . . express[ed] in Part IV with respect to the notice under the ordinance."[98] And Justices O'Connor and Breyer thought that the failure to sufficiently control the discretion of the officers in enforcing the ordinance was enough to find it void for vagueness and that there was, thus, "no need to consider the other issues briefed by the parties and addressed by the plurality."[99]

Chief Justice Rehnquist and Justices Scalia and Thomas dissented. Justice Scalia, in a tirade of condescension,[100] joined by no one, lambasted the majority and concurring opinions on a variety of fronts. In summary, he accused the majority of "ignoring our rules governing facial challenges, . . . elevating loitering to a

92. *Id.*
93. *Id.*
94. *Id.* at 62.
95. *Id.*
96. *Morales*, 527 U.S. at 62.
97. *Id.* at 57.
98. *Id.* at 69.
99. *Id.* at 68.
100. In an opinion that reads as though it were 'punched up' by noted columnist George Will, Scalia accused the Court of having created "irrational exceptions . . . without any attempt at explanation," 119 S.Ct. at 1871; claimed that the plurality "has made . . . up for this case" a formula governing facial challenges to statutes, *id.* at 1872; referred to the plurality as considering "activities as doing (ugh!) business," as lesser constitutionally protected activities, *id.*; stated that the plurality treats the "historical practices of our people [as] nothing more than a speed bump on the road to the 'right' result," *id.*; stated that "I have not the slightest idea what this means," after quoting a sentence from Justice Kennedy's concurrence, *id.* at 1874; wrote that "the Justices in the majority hide behind an artificial construct of judicial constraint," *id.* at 1876; referred to people with "no apparent purpose" as "regrettably in oversupply," *id.* at 1877; referred to the majority's "tortured analysis" and "their suggested solutions that bear no relation to the identified constitutional problem." *Id.* at 1879.

constitutionally guaranteed right, and . . . discerning vagueness where, according to our usual standards, none exists."[101] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, primarily disagreed with the majority's conclusion that the ordinance invests too much discretion in police officers. "Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions . . . preserving the public peace."[102]

Although the decision is significant for reaffirming the *void for vagueness doctrine*, it also provides some good news and bad news for parents of young children who are constantly squabbling. The good news is that the children are arguably in the good company of Supreme Court Justices. The bad news is that no parent should expect their children to soon grow out of their squabbling phase.

In an effort to make the point that the infringement on freedom caused by the Gang Congregation Ordinance was simply a permissible choice that the citizens of Chicago were permitted to make, Justice Scalia pointed out that the citizens of Chicago "were once free to drive about the city at whatever speed they wished," but "at some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits."[103] Justice Stevens (or perhaps one of his law clerks) challenged Justice Scalia's statement in a manner that any parent would readily recognize as nothing more than a somewhat refined twist on the old let's-argue-about-a-totally-irrelevant-point, that was probably honed on some long family car trips as a child. In a footnote, Justice Stevens, in reference to Justice Scalia's comment about the imposition of speed limits, wrote that "[h]istory tells quite a different story."[104] After citing a brief history of the speed limit laws in Illinois and referring to the great disparity between the number of pedestrians and the number of cars, Justice Stevens concluded that "it seems quite clear that it was pedestrians, rather than drivers, who were primarily responsible for Illinois' decision to impose a speed limit."[105] Of course, if this exchange had occurred in the back seat of the family car, any self-respecting parent would have felt obligated to say, "STOP IT RIGHT NOW!" At least Justice Stevens didn't say, "Well, Antonin started it by calling my construct of judicial restraint "artificial" and referring to my analysis as "tortured."[106] So maybe there is some hope that they will outgrow it, after all.

MITCHELL V. UNITED STATES[107] - SELF INCRIMINATION AT SENTENCING

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against

101. Morales, 527 U.S. at 72.
102. *Id.* at 106 (Thomas, J., dissenting).
103. *Id.* at 72 (Breyer, J., concurring).
104. *Id.* at 54, n.21.
105. *Id.*
106. *See supra* note 100.
107. 526 U.S. 314 (1999).

himself."[108] In *Griffin v. California*,[109] the Supreme Court held that this privilege against self-incrimination "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[110] And in *Carter v. Kentucky*,[111] the Court held that upon request by the defendant the trial judge must instruct the jury that they may not draw any adverse inferences from the defendant's failure to testify.[112] A defendant may, of course, waive the protection of the privilege by voluntarily testifying[113] and the scope of the "waiver is determined by the scope of the relevant cross-examination."[114] In *Mitchell v. United States*,[115] the court was presented with the questions whether a guilty plea waives the privilege in the sentencing phase of the case and whether the trial court may draw an adverse inference from the defendant's silence.

In 1995 Amanda Mitchell, without a plea agreement, pleaded guilty to one count of conspiring to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. § 846, and to three counts of distributing cocaine within 1,000 feet of a school or playground, in violation of § 860(a).[116] She reserved the right to contest the quantity of the cocaine under the conspiracy count, which the trial court advised would be determined at the sentencing hearing.[117] At the sentencing hearing, the District Court ruled that, as a result of her guilty plea, she had waived her right to remain silent with respect to the details of her crime. The court then found that she had been involved with the distribution of more than five kilograms of cocaine and that "[o]ne of the things" that persuaded the court to rely on the testimony of her co-defendants with respect to the amount was Mitchell's "not testifying to the contrary."[118] The Court of Appeals for the Third Circuit affirmed the sentence and the Supreme Court granted certiorari to resolve an apparent conflict among the circuit courts.[119]

Justice Kennedy, in an opinion joined by Justices Stevens, Souter, Ginsburg, and Breyer, held that Mitchell's guilty plea did not constitute a waiver of her privilege against self-incrimination at the sentencing hearing and that the trial court could not draw an adverse inference from her invocation of the privilege.[120] In a

108. U.S. CONST. amend. V.
109. 380 U.S. 609 (1965).
110. *Id.* at 615.
111. 450 U.S. 288 (1981).
112. *Id.* at 304. In Lakeside v. Oregon, 435 U.S. 333 (1978), the Court had previously held that such an instruction could be given over the defendant's objection.
113. Rogers v. United States, 340 U.S. 367, 370 (1951).
114. Brown v. United States, 356 U.S. 148, 154-155 (1958).
115. 526 U.S. 314 (1999).
116. *See id.*
117. Mitchell, 526 U.S. 317.
118. *Id.*
119. *Id.* at 319. Other Circuits had held that a defendant retains the privilege against self-incrimination at sentencing. United States v. Kuku, 129 F.3d 1435, 1437-1438 (11th Cir. 1997); United States v. Garcia, 78 F.3d 1457, 1463 (10th Cir. 1996); United States v. De La Cruz, 996 F.2d 1307, 1312-1313 (1st Cir. 1993); United States v. Hernandez, 962 F.2d 1152, 1161 (5th Cir. 1992); Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067, 1075-1076 (6th Cir. 1990); United States v. Lugg, 892 F.2d 101, 102-103 (C.A.D.C. 1989); United States v. Paris, 827 F.2d 395, 398-399 (9th Cir. 1987).
120. Mitchell, 526 U.S. 319.

dissenting opinion, Justices Scalia, Chief Justice Rehnquist, Justice O'Connor and Justice Thomas actually "agree[d] with the Court that Mitchell had the right to invoke her Fifth Amendment privilege during the sentencing phase of her criminal case."[121] They disagreed, though, that the trial court could not draw adverse inferences "that reasonably flow from her failure to testify."[122]

Since none of the Justices argued against allowing the privilege to be invoked at the sentencing hearing, the only real controversy raised by the case was with respect to whether an adverse inference can be drawn from the invocation of the privilege. Four members of the Court are clearly dissatisfied with *Griffin* and *Carter* and do not think that the ban on adverse inference can be supported by the Constitution. As the dissent stated, "the text and history of the Fifth Amendment give no indication that there is a federal constitutional prohibition on the use of the defendant's silence as demeanor evidence."[123] Although "Griffin was a wrong turn,"[124] Scalia, joined by Rehnquist, O'Connor and Thomas, concluded that was "not cause enough to overrule it."[125] However, Justice Thomas did say that he "would be willing to reconsider *Griffin* and *Carter* in the appropriate case."[126]

Although *Mitchell* has some significance for reaffirming the *no-adverse-inference doctrine* and extending it to the sentencing stage, from a practical standpoint, the case will not likely have much impact. The only reason this issue even reached the Supreme Court is because the trial judge happened to mention that he had considered the fact that the defendant had not testified. If he had not mentioned it, no one would have been the wiser. As the Court acknowledged in *Carter,* "[n]o judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation."[127] It would seem to be equally difficult to prevent a judge from speculating. The majority itself, though, provided an even more blatant subterfuge to circumvent the rule. The Court suggested that a district court, in accepting a plea pursuant to Rule 11 of the Federal Rules of Criminal Procedure, could "make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there is no factual basis."[128] The Court then noted that "a defendant who withholds information by invoking the privilege against self-incrimination at a plea colloquy runs the risk the district court will find the factual basis inadequate."[129] If the defendant does not invoke the privilege at the plea colloquy, any statements made would then be admissible at the sentencing hearing.[130] The Court also suggested the possibility of a major hole in the no-adverse-inference rule when it ended the opinion by stating that "[w]hether silence bears upon the determination

121. *Id.* at 330.
122. *Id.*
123. *Id.* at 334 (Scalia, J., dissenting).
124. *Id.* at 336.
125. *Id.*
126. *Id.* at 342 (Thomas, J., dissenting).
127. Carter, 450 U.S. at 288.
128. Mitchell, 526 U.S. 324.
129. *Id.*
130. *Id.*

of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in section 3E1.1 of the United States Sentencing Guidelines (1998) is a separate question."[131]

STRICKLER V. GREENE[132] - DISCLOSURE OF EXCULPATORY MATERIAL

Tommy David Stickler was convicted and sentenced to death for his role in the abduction and murder of Leanne Whitlock in January, 1990. At trial a witness named Anne Stoltzfus testified in "vivid detail" about the abduction of Whitlock from the Valley Shopping Mall in Harrisonburg, Virginia.[133] She testified at trial that she saw Strickler, whom she called "Mountain Man," in the mall and that she was frightened of him because he was "revved up" and "very impatient." As she was leaving the mall with her fourteen year-old daughter, she saw "Mountain Man" again. This time he shook Whitlock's car, yanked the door open, jumped in and started hitting her. Stoltzfus then drove up and asked whether Whitlock was okay, and realized as she was driving away that Whitlock had mouthed the word "help." She then followed Whitlock's car as it drove around her, went over the curb with its horn still honking and headed out of the mall. She told her daughter to write the license number on an index card and then headed for home. She did not call the police at that time. Approximately a week and a half later the police contacted her after having been called by someone Stultzfus had told about the incident. She further testified that she has "an exceptionally good memory" and that Strickler made "an emotional impression with me because of his behavior."[134]

The Virginia Supreme Court affirmed Strickler's conviction and death sentence.[135] New counsel then pursued a state habeas corpus proceeding, claiming ineffective assistance of counsel, based, in part, on trial counsel's failure to file a motion "to have the Commonwealth disclose to the defense all exculpatory evidence known to it, or in its possession"[136] - also known as a Brady claim.[137] In response, the Commonwealth claimed that such a motion was unnecessary because the prosecutor had maintained an open file policy.[138] After the state court dismissed the petition, Strickler filed a federal habeas corpus petition. As a result of an order granting Strickler's counsel an opportunity to examine and copy all of the police and prosecution files in the case, Strickler's counsel first learned of some exculpatory information related to the testimony of Anne Stoltzfus.[139] These materials indicated that she had not even initially remembered being at the mall

131. *Id.* at 331.
132. 527 U.S. 263 (1999).
133. Strickler, 119 S.Ct. at 1941.
134. *Id.* at 1943-1944. The actual facts recited in the majority opinion are much too detailed and lengthy to repeat here, but the summary of those facts in the text should suffice to give the reader an idea of the nature and detail of Stoltzfus' testimony.
135. Strickler v. Commonwealth, 404 S.E.2d 227 (Va.1991).
136. Strickler, 119 S.Ct. at 1946.
137. So named after Brady v. Maryland, 373 U.S. 83 (1963).
138. Strickler, 119 S.Ct. at 1936.
139. *Id.*

until her daughter had jogged her memory and that she had a very vague memory of what happened. Her initial description of the car did not even mention the license number which she vividly recalled at trial. She could not initially identify the victim, Whitlock, but after spending several hours with Whitlock's boyfriend, looking at current photographs, she was able to identify her "beyond a shadow of a doubt."[140] The District Court concluded that the failure to disclose these materials was sufficiently prejudicial to undermine confidence in the jury's verdict and granted summary judgment to Strickler and granted the writ of habeas corpus. The Court of Appeals for the Fourth Circuit reversed.[141]

One of the reasons for the Fourth Circuit's reversal was that the Brady claim was procedurally defective because the factual basis for the claim had been available when Strickler filed his state habeas petition, but he had failed to raise it then. The Supreme Court rather quickly dispensed with this argument by holding that the failure to raise the Brady claim in the state habeas petition was excused "because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's . . . duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received 'everything known to the government.'"[142]

The Court then proceeded to address the merits of the Brady claim by providing a summary of the essential components of a Brady violation. In *Brady v. Maryland*,[143] the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[144] The Court later held that the duty to disclose such evidence did not depend upon a request by the defendant[145] and that the duty to disclose exculpatory evidence also included the duty to disclose evidence that could be used for impeachment.[146] The duty to disclose evidence encompasses evidence "known only to police investigators and not the prosecutor."[147] Thus, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[148] In order for the suppressed evidence to be "material" there must be "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[149] The Court easily concluded that the state had, at least

140. *Id.* at 1944-1945. Much greater detail of these exculpatory materials is included in the majority opinion, but the summary in the text should suffice to give the reader an appreciation of the stark contrast between Stoltfuz's vivid and confident trial testimony and her vague uncertainty before trial.
141. *Id.* at 1947.
142. *Id.* at 1952.
143. 373 U.S. 83 (1963).
144. *Id.* at 87.
145. United States v. Agurs, 427 U.S. 97 (1976).
146. United States v. Bagley, 473 U.S. 667 (1985).
147. Kyles v. Whitley, 514 U.S. 419, 438 (1995).
148. *Id.* at 437.
149. Bagley, 473 U.S. at 682.

inadvertently, suppressed evidence that was favorable to Strickler. The "most difficult element of the claimed Brady violation" though, was whether Strickler had established the prejudice necessary to satisfy the "materiality" requirement of Brady.[150]

All of the Justices agreed that the standard for determining the materiality of the suppressed information, and thus, prejudice, is whether "'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense."[151] The only disagreement came in the application of that test to the facts of the case. Justice Stevens, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Ginsburg, Breyer, and Thomas, concluded that Strickler had not shown that there was a reasonable probability that either the guilty verdict or the death penalty would have been different if the suppressed materials had been supplied to the defense. Justice Souter and Kennedy agreed with that conclusion with respect to the guilty verdict but thought that there was a reasonable probability that the sentence may have been different, and would have remanded the case for reconsideration of the death penalty.[152]

Although the decision in *Strickler v. Greene* simply reaffirmed[153] the materiality test that the Court has been applying for years, the opinions clearly highlight the difficulty courts have in applying that less than illuminating test. The first problem concerns the proper relationship between the other evidence in the case and the suppressed material. The Court of Appeals had concluded that "without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty."[154] The Court held that standard incorrect. It pointed out that "the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions."[155] The appropriate question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[156] However, when the Court then proceeded to analyze the facts of the case under that standard it appeared that it was doing exactly what it had just criticized the Court of Appeals for doing. For example, the Court stated that even if Stoltzfus' testimony had been entirely discredited, the jury might still have reached certain conclusions about Strickler's involvement in the crime. And it did that by looking to the other evidence in the case and, at least implicitly, suggesting that the other evidence in the case supported the jury's verdict, which seems like exactly what the Court criticized the Court of

150. Srickler, 119. S.Ct. at 1949.
151. *Id.* at 1952. As discussed elsewhere, Justices Souter and Kennedy advocated changing the test from "reasonable probability" to "significant possibility," although they admit that by doing so they do not intend to change the substance of the test.
152. *Id.* at 1961.
153. The majority specifically stated that "our opinion does not modify Brady." *Id.* at 1952, n.35.
154. *Id.* at 1952.
155. *Id.*
156. *Id.*

Appeals for doing. The Court did not really discuss the suppressed evidence in the context of how it might have "undermined confidence" in the conclusions that the jury reached based on the other evidence in the case.

The decision further illustrates the seemingly incomprehensible distinctions that the materiality test requires a court to make. The Court pointed out that discrediting Stoltzfus' testimony with the suppressed information "might have changed" the outcome of the trial.[157] And in another passage the Court agreed with the District Court that there was a "reasonable possibility" that the outcome may have been different.[158] But, as the Court emphasized, the correct standard is whether there is a "reasonable probability" of a different result,[159] which the Court has previously held is not a more-likely-than-not standard.[160] Thus, a court, in deciding a Brady claim, must determine whether there is a "reasonable probability" of a different result, which lies somewhere between "might have changed" or "reasonable possibility" and "more-likely- than- not."

While the majority pretended that this standard is understandable, the concurring and dissenting opinion by Justices Souter and Kennedy at least acknowledged that the familiar test is perhaps "familiarly deceptive."[161] They suggested that the continued use of the term "probability" "raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.'"[162] They then recommend changing the standard to "significant possibility," which they claimed "would do better at capturing the degree to which the undisclosed evidence would place the actual result in question."[163]

157. *Id.*
158. *Id.* at 1953.
159. *Id.*
160. United States v. Agurs, 427 U.S. 97 (1976).
161. Strickler, 119 S.Ct. at 1956.
162. *Id.*
163. *Id.*